SUPREME COURT, U. S.

DEC 19 1974

IN THE

Supreme Court of the United States

October Term, 1974

No. 74 580

BENNIE STONE GOODEN, *et al.*,

Petitioners,

v.

MISSISSIPPI STATE UNIVERSITY, *et al.*

SUPPLEMENTAL AND REPLY BRIEF IN SUPPORT OF CERTIORARI

JACK GREENBERG
JAMES M. NABRIT, III
CHARLES STEPHEN RALSTON
NORMAN CHACHKIN
MELVYN R. LEVENTHAL
10 Columbus Circle
New York, New York 10019

FRED L. BANKS, JR.
538½ North Farish Street
Jackson, Mississippi 39202

Attorneys for Petitioners

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Petitioners file this Supplemental and Reply Brief in Support of Certiorari pursuant to Supreme Court Rules 24 (4) & (5).

I.

Reply Brief

1. We agree with respondents that the:

> appellate court succinctly stated the issue now before this court:
>
> > 'the single issue in this cause continues to be whether a controversy which would support injunctive relief remained after the withdrawal of the single private school request for the use of public facilities.' [1]
>
> [Brief in Opposition, p. 5, Appeals Court Opinion, Pp. 25a.]

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[1] We do, however, contest the statement that there was only "a single private school request." See Pp. 14, n. 11.

As we demonstrate below, this critical issue is unnecessarily clouded by a series of supplemental arguments or asides advanced by respondents and the Court of Appeals.

(A) Respondents assert that the Court of Appeals properly characterized the trial court hearing as statements of counsel without findings of fact (p. 4, Brief in Opposition). Rule 52(a) is fully satisfied without formal findings when, as herein, the district court expresses with clarity the bases for its decision. Pp. 5-6, 13a-18a. But even if it is assumed that the district court acted too casually, still: a) the decision below does not turn or even rely on that deficiency and b) the remedy therefor is not dismissal but a remand for further findings. See discussion in Moore's *Federal Practice*, Vol. 5A, ¶ 52.06, p. 2705, *et seq.*, and in particular pp. 2718-23.

(B) Respondents (p. 5, Brief in Opposition), rely heavily upon the alleged "lack of factual support for injunctive relief." The pleadings confirmed the continued existence of an unlawful policy: private schools which discriminate on the basis of race were authorized and continue to be authorized to use public university facilities for the conduct of athletic contests. Defendants at the hearing before the district court declined to offer any proof of a change in that policy.[2] These facts are at the foundation of the district court's injunctive order; and since defendants bear the "heavy burden" of making it "absolutely clear" that the "wrongful behavior could not reasonably be expected to recur," [*United States* v. *Phosphate Export Ass'n.*, 393 U.S. 199, 203 (1968)], the silent record evidences a "lack of factual support" for a finding of *mootness* and reinforces plaintiff's right to injunctive relief.

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[2] Indeed, they do not advise this Court, nor did they advise the Court of Appeals, of any change in policy.

(C) The Court of Appeals dismissed this action as moot because of the alleged voluntary cessation of unlawful activity; its assertion, in footnote (Pp. 25a, n. 4), that plaintiffs failed to prove injury from the policy under challenge was therefore not discussed in the Petition. Nevertheless, respondents press the issue (Brief in Opposition, pp. 8-9) and a response is appropriate.

Respondents' position and the appeals court suggestion are overwhelmed by precedent unanimously entered by this Court. Black children attending public schools are perhaps the only parties with standing to challenge, as violative of Equal Protection, state aid to private racially segregated schools.[3] They have successfully done so, in behalf of all black school age children in a given state, in *all* of the tuition grant cases, and more recently in cases challenging tax exemptions and textbook aid.[4] This Court has specifically held that "concrete injury . . . [is] suffered" by such children when the State violates its "constitutional obligation . . . [to] steer clear, not only of operating the old dual system of racially segregated schools, but also of giving significant aid to institutions that practice racial or other invidious discrimination." *Gilmore* v. *City of Montgomery*, 41 L.Ed. 2d 304, 318, n. 10; *Norwood* v. *Harrison*, 413 U.S. at p. 467. Accordingly, footnote 10 of *Gilmore, supra*, cited by respondents and the Court of Appeals, supports rather than undermines petitioners' position: the misgivings expressed therein related to the standing of plaintiffs "to an action desegregating . . . city parks and recreational facil-

[3] However, a suit to desegregate or gain admission to schools allegedly discriminatory may be best litigated by black children denied admission.

[4] See, for example *Norwood* v. *Harrison*, 413 U.S. 455 (1973) and cases cited therein at page 463, n. 6, and *Green* v. *Connally*, 330 F. Supp. 1150, *aff'd sub nom. Coit* v. *Green*, 404 U.S. 997, (1971).

ities" to challenge state aid to segregationist private schools; but the standing of black children in public schools to challenge such aid was specifically upheld.

(D) Respondents argue that the injunctive order was "overbroad" noting that only one university was shown to have acted while the order covered all institutions of higher learning. (Brief in Opposition, p. 8). The district court's basis for awarding comprehensive injunctive relief was defendants' admission that they have "plenary authority" over all public institutions of higher learning. (Pp. 3a and 9a). The gravamen of the Complaint, as the Court of Appeals observed, (Pp. 24a), was the failure of such defendants to adopt a policy against the unlawful use of facilities subject to its control in the same way that the Mississippi Textbook Purchasing Board failed to adopt such a policy for the use of state textbooks in *Norwood* v. *Harrison, supra.* The unlawful use at Mississippi State was but a symptom of the underlying state-wide policy. But even if the district court order is "overboard" then still the appropriate disposition is not dismissal of the entire action but instead a remand for further findings to determine whether the injunction should extend to institutions other than Mississippi State University.

(E) Finally, respondents claim that the conduct under challenge was not clearly unlawful until the Court's decision in *Gilmore; Gilmore,* in the district court, "was decided less than a month before this action was filed." (Brief in Oppostion, p. 13). We remind the Court that the policy under challenge, but for the district court order now vacated by the Court of Appeals, *is still in effect.*

Moreover, *"it is well established* that federal courts may enjoin any state assistance to private school organizations which serves to 'impede, thwart or frustrate the execution

of the integration plan mandated against a public school district,'" and that "the adverse effects of the creation of all-white private schools on public school desegregation *have long been recognized. . . .*" *Gilmore* v. *City of Montgomery*, 473 F.2d 832, 835-36, (5th Cir. 1973), citing *Cooper* v. *Aaron*, 358 U.S. 1 (1958), (emphasis added). The difficult question raised in *Gilmore*, and on which the Court granted *certiorari*, was whether and/or under what circumstances, may private racially discriminatory organizations, *not school affiliated*, use public recreational facilities. Accordingly, it is idle for respondents to claim that *Gilmore* as opposed to *Brown* or *Cooper* v. *Aaron* established their action as unlawful.

II.

Supplemental Brief

1. A recent summary action by this Court well illustrates the difference between a finding of mootness based upon a change in plaintiff's status and mootness based upon the cessation of unlawful activity. In *Regan* v. *Johnson*, S. Ct. No. 74-108, November 18, 1974 [43 L.W. 3216; 43 L.W. 3294], the Court of Appeals held certain parole procedures violative of due process although plaintiff had been paroled while the case was pending on appeal; this Court vacated the judgment and remanded with directions to dismiss the case as moot. The subject matter of the action—parole policies and procedures—was still in controversy but plaintiff, once paroled, could not claim any injury therefrom. Summary dismissal in the appeals court is appropriate in such a case, while broad discretion in, and a determination by the district court, is required when defendant's claim of mootness is based upon the alleged cessation of unlawful conduct.

2. A suit has been filed challenging Miss. Code, 1972, § 47-5-91 to the extent that it authorizes, and the Mississippi State Penitentiary has expended funds for, tuition grants and transportation aid for penitentiary employees' children enrolled in segregationist academies. *Armstrong et al.* v. *Jack Reed, Superintendent of Parchman Penitentiary, et al.*, N.D. Miss., Civil Action No. GC 74 118-K, November 22, 1974. (The statute is referred to in footnote 9 of the Petition, page 13.)

Respectfully submitted,

JACK GREENBERG
JAMES M. NABRIT, III
CHARLES STEPHEN RALSTON
NORMAN CHACHKIN
MELVYN R. LEVENTHAL
10 Columbus Circle
New York, New York 10019

FRED L. BANKS, JR.
538½ N. Farish St.
Jackson, Mississippi

Attorneys for Petitioners